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IN THE

SUPREME COURT OF THE UNITED STATES

1957 TERM

No._____

ABRAHAM THOMAS,
APPELLANT,

vs.

COLONEL JAMES W. DAVIS, COMMANDANT,
UNITED STATES DISCIPLINARY BARRACKS,
FORT LEAVENWORTH, KANSAS,
APPELLEE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Appellant, Abraham Thomas, respectfully prays for a Writ of Certiorari and review of the judgment of the Court of Appeals, Tenth Circuit, affirming the judgment of the United States District Court for the District of Kansas, denying appellant's Writ of Habeas Corpus. Said case having been decided 29th day of October, 1957. Rehearing denied *November 14th*, 1957.

OPINIONS.

The Petition for Writ of Habeas Corpus was filed in the United States District Court for Kansas, March 21, 1957. Motion to Dismiss was sustained April 29, 1957. No written opinion. The judgment of the Court of Appeals affirming the judgment of the District Court was handed down October 29, 1957. Rehearing denied *November 14th*, 1957. Case No. 5653, September term, 1957, in Court of Appeals, not yet reported in reporter system.

JURISDICTION.

Judgment of the Court of Appeals affirming the judgment of the District Court was entered October 29, 1957. Jurisdiction of the Supreme Court is invoked under Sections 237 (b) and 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, (28 USCA 1257, 2103, 2106, and 1254). Rule 38 of the Supreme Court.

SUMMARY OF MATTER INVOLVED.

Appellant is an illiterate Negro soldier, intelligence quotient 58, who has been found guilty by military court-martial of four charges of premeditated murder and sentenced to death. He is confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas, pending execution of the sentence.

The sentence has been upheld by army reviewing authorities, affirmed by the United States Court of Military Appeals and confirmed by the President.

QUESTIONS PRESENTED.

1. Can a confession be secured from an illiterate Southern Negro soldier after three days and part of two nights questioning, without charges having been filed, used against him at his courtmartial trial?

2. This Court has said that: (Burns v. Wilson, 346 U. S. 137, footnote 12)

> "The rule of McNabb v. United States, 318 U. S. 332 (1943) . . . is a rule of evidence in the federal civil courts; its source is not 'due process' . . . We have of course no such supervisory power over the admissibility of evidence in courts-martial."

Under the facts in this case isn't the correct rule that laid down in Mallory v. U. S. 77 S. Ct. 1356:

> "The arrested person may be booked, by the police. But he is not to be taken to Police Headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt."

Isn't the Constitution itself before the Court—not the Appellant?

3. Can a statement be taken from an accused on a tape recorder, without his knowledge—then be played to the triers of fact—and prosecutors argue to the Court that they heard accused in his own words admit his guilt?

4. Do not all the facts in this case, coerced confession —no charges filed until three days and part of two nights questioning had taken place—use of tape recorder and comment of prosecution that Court had heard accused in

his own words admit guilt, deny him a fundamentally fair hearing at his courts-martial trial?

REASONS FOR GRANTING WRIT.

Appellant is an illiterate Southern Negro soldier—he was merely being held in army awaiting a discharge because his I. Q. was only 58. He was questioned for most of three days and part of two nights—without food or blankets—denied right to see a doctor—was subjected to having his statement recorded on a tape recorder—without his knowing it—then at his trial the tape was played to the Court—the prosecutor in his final argument stated that the Court had heard accused in his own words admit his guilt—that accused has been denied a fundamentally fair trial by the courts-martial. Burns v. Wilson, 346 U. S. 137.

ARGUMENT AND AUTHORITIES.

STATEMENT OF THE FACTS.

On April 15, 1954, appellant was sentenced to be put to death upon his conviction for violation of the Uniform Code of Military Justice, Article 118, in Four Specifications of the offense of premeditated murder on four different persons. The sentence imposed was affirmed by the Board of Review which in turn was affirmed by the United States Court of Military Appeals. Case No. 5792 decided June 24, 1955. The sentence was approved by the President of the United States and ordered into execution the instant Petition for Habeas Corpus was filed March 21, 1957. Honorable Arthur J. Mellott, Chief Judge,

United States District of Kansas, April 29, 1957, sustained a Motion to Dismiss and remanded appellant to the custody of the appellee. Proceedings on the appeal were commenced May 2, 1957.

About 11:00 A.M. February 23, 1954, Sergeant Theodore Bryant found four dead bodies in a house in the town of Gersthofen. The appellant was an enlisted man in the United States Army at this place in Germany. It appears that appellant had been keeping company with Elizabeth Wenderott, one of the persons found dead in said house, a week, or ten days, prior to the finding of the bodies. There was evidence that appellant had had an argument with said Elizabeth Wenderott, who apparently struck her and she had filed a Complaint with the military authorities. Appellant was taken into custody on the same day, the 23rd of February, 1954, by the Military Police. He denies that he was advised as to why he was taken into custody. On the very same day he was taken to a Field Hospital and paraffin molds were taken of his hands. He was not advised of his rights to have counsel at any time during the investigation which lasted for four days. (Court Martial Trial R 205)

The Army Investigators interrogated and questioned Thomas from 9 o'clock on the night of Feburary 23, 1954, until approximately midnight. (Court Martial Trial R 207)

Thomas was placed in a Military Police Detention Cell at Ausburg, Germany, that night without blankets or mattress (Court Martial Trial R 210). On the next morn-

ing, February 24, 1954, Thomas was again taken before the investigators and questioned for approximately two hours. (Court Martial Trial R 212)

The same afternoon he was taken in custody of the investigators to the scene of the alleged crime where the investigators pointed out to him pools of blood and gore which were still there. He was shown blood spots on the walls, the ceiling and where the bodies had lain. This trip took approximately one hour. (Court Martial Trial R 212)

Upon return to the Military Jail, he was further questioned for another 30 minutes and later on that same night he was again brought before the investigators and further questioned for another two hours. (Trial Court Martial R 213)

He had still not been advised as to his rights to counsel and according to Thomas never actually informed why he was under arrest. He was asked if he would voluntarily submit to a lie detector test in Munich, Germany.

Thomas again slept that night in the Detention Cell without blankets. On the 25th of February the investigators took Thomas from the Detention Cell at 8 o'clock in the morning and took him to Munich, Germany. He was taken before a Mr. Fox, an Army operator of a lie detector machine. He was given two separate examinations and after periods of questioning by Mr. Fox and actually given a lie detector examination. (Court Martial Trial R 216)

On the same day at about 6 o'clock P.M. Thomas was taken before an Army Officer named O'Brien where he was questioned at length by O'Brien and other investigators. The appellant was ill at the time. (Trial of Court Martial R 220)

Appellant was returned to Ausburg shortly after 9 o'clock that night after having been in the Company and under investigation and questioning by various Army Investigators from 8 o'clock in the morning until after 9:00 P.M. in the evening. The Army Investigators without the knowledge of Thomas made arrangements with an Army Investigator named Beasley to rig up tape recording equipment in their offices in a separate room where Thomas could not see the equipment and to conceal the microphone in another room and to record conversation with Thomas without his being aware of these facts. (Court Martial Trial R 221-222)

The first attempted recording on Thomas' statements to the recorders was a failure. The investigators claim that they then brought the microphone from its concealed place in the room, placed it on the table and had Thomas speak directly into the microphone.

Thomas denied the microphone was ever placed in front of him or in his presence. (Trial Court Martial R 223-224)

In addition to this, the Army Investigators claim they made a Transcript in typewriting of a conversation recorded between Thomas and the investigators. The second Army witness verifies the fact that Thomas was questioned the full two days and later all day at Munich, Germany. (Trial Court Martial R 231) It is also admitted

that the tape recording was never played back or shown to Thomas. (Trial Court Martial R 235)

It is also admitted that Tomas knew nothing about tape recording. (Trial Court Martial R 237)

The Army Investigators further state that they did not believe Thomas could have understood or properly made a written statement (Trial Court Martial R 241)

Thomas had only a 3rd grade education. (Trial Court Martial R 242)

The second Army Investigator admits Thomas was questioned for two hours, February 23rd, 1954, at night. (Trial Court Martial R 251)

He also corroborates the second questioning of Thomas. (Trial Court Martial R 255)

He also corroborates additional questioning. (Trial Court Martial R 258)

He also corroborates still additional conversation, or questioning. (Trial Court Martial R 259)

Additional corroboration a full day and evening questioning and lie detector tests at Munich, Germany. (Trial Court Martial R 260)

This witness also corroborates Thomas' request for a Doctor while at Munich. This request was never granted due to the fact that a funeral was being held for some General. (Trial Court Martial R 261)

Concealment of microphone is corroborated. (Trial Court Martial 266)

Witness corroborates that Thomas had no blankets for two nights and only served eggs by prosecution while undergoing questioning. (Trial Court Martial R 270)

This witness also states Thomas could not have understood a written statement. (Trial Court Marital R 274)

Thomas was never told what a recorder or microphone was, nor advised of his recordings. (Trial Court Martial R 275)

Thomas denied getting to see a Doctor when ill during questioning. (Trial Court Martial R 277-278)

Investigators admit they have been unable to get a statement or admission for first two full days. (Transcript Court Martial 279)

Thomas not told about tape recorder. (Court Martial Trial R 282-283)

Witness corroborates paraffin test. (Court Martial Trial R 291)

Witness testifies Thomas is emotionally unstable. (Court Martial Trial R 312)

Commanding Officer gave Thomas a good record. (Court Martial Trial R 313)

Thomas' IQ only 58. (Court Martial Trial R 314)

Discussion in front of Court Martial at Trial relative to the procedure used in questioning Thomas under lie detector. (Court Martial Trial R 348)

Commissioner Officer O'Brien ordered to question Thomas at Munich. (Court Martial Trial R 353)

Corroboration of long questioning of Thomas. (Court Martial Trial R 360)

Thomas unable to comprehend Questions. (Court Martial Trial R 880)

Typewritten transcript of tape recording Prosecution Exhibit 23 introduced in evidence and read to Court Martial. (Trial Court Martial R 384)

Explanation to Court or operator of tape recorder. (Trial of Court Martial R 390)

Recorder equipment set up in Court. (Court Martial Trial 394)

Actual tape recording Thomas questioning Exhibit 24A introduced in evidence against Thomas. (Trial Court Martial 396)

Tape recording of Thomas' conversation played in open Court Martial Trial to Thomas in Court. (Trial Court Martial R 398)

Thomas after being advised of his rights elected not to testify or take the stand. (Trial Court Martial R 66 and 411)

Argument of prosecution at the close of case commences. (Trial Court Martial R 445)

Prosecutor in argument comments on long questioning of Thomas including fact he was given lie detector test. (Trial Court Martial R 457-460)

PROSECUTION ATTORNEY AND ARGUMENT STATED: "When Thomas was brought back to Augsburg that night after he had confessed in Munich, arrangements were made for a tape recording and this tape recording was placed here in Court and you heard it. And if you will remember the fact that the Transcript of that recording was introduced in evidence first, and if you compared that Transcript with that recording you had very little difficulty in understanding the record-

ing. *You heard in Thomas' own words, as he related how he killed these people; these four people.*" (Trial Court Martial R 460)

The prosecution in its closing argument again directly points out that Thomas, in his own testimony, made certain admissions. At page 462 of the Court Martial Trial record the prosecutor stated: "And according to his own testimony he had blood in his eyes." the record clearly shows that Thomas never had been notified he was entitled to a lawyer, nor had he seen one until after the entire period of questioning which lapsed over four days. (Trial Court Martial R 472)

The prosecution in its argument admits it took full three days to get the accused Thomas to make a statement, or admission. (Trial Court Martial R 479)

The prosecution again in its final and closing argument comments on the fact that Thomas in his own words admits his guilt, Page 480, of the Trial Record and Court Martial. The prosecutor stated as follows: "Nobody has told him what to say. They let him tell it in his own words—as you listen to the tape there—and those words were his own words gentlemen. Words were not put into his mouth."

POINT I.

The record shows that appellant was questioned for three days before he made any admission. He was never advised of his right to counsel at any time during his questioning. On the day he was taken into custody and he denies he was told why he was taken into custody, he thought it was on the Complaint filed by the victim

Wendroth of assaulting her—he was taken to an Army Hospital and given a paraffin test. He had not been advised of his rights under Article 31 up to this time. The record so shows.

He was next questioned for three hours the night he was taken into custody. That night he was placed in a detention cell without mattresses or blankets. The next day he was further questioned at length, and shown the results of the paraffin tests. In the afternoon he was taken to the scene of the crime—shown the blood on the walls, floors and the gore that still remained. He was taken back to the cell and again questioned. He was questioned again that night. He again slept in a cell without blankets.

The next day he was taken to Munich at 8:00 A.M., and went through an entire day and up to 9 o'clock at night of questioning. He was given two lie detector tests—this fact was brought out by the prosecution at his Court Martial Trial—although there was no report on how the lie detector tests came out—one must assume that the triers of fact could only conclude the tests were against the appellant. He was on the same day questioned by Officer O'Brien who had been ordered to do so by his Commanding Officer—appellant was sick and wanted to see a Doctor—he was not allowed to do so—the reason given was that a General's funeral was that day and nobody was available. He was returned to Augsburg about 10 o'clock that night—so after three full days and two nights it is claimed he broke down and made admissions to Officer O'Brien—it is also to be noted that

on this night he was given blankets. It is also noted and not denied in the record that appellant on the first two days of his confinement while undergoing questioning he was only given eggs for his morning meals. On the following day, which is the fourth full day, he was subjected to being tricked into talking to two Army Investigators in a room where a tape recorder had been hidden without appellant's knowledge—the first recording was a failure because the microphone had been concealed under a garrison cap. The investigators claim they then put the microphone on the table in front of appellant and had him repeat his story. Appellant denies he ever knew his voice was being recorded and the record shows he was never so advised.

The case of Mallory v. U.S., 77 S. Ct. 1356, applies directly to point One. It provides that under enforcement of Federal Criminal Law that an accused must be arraigned "without unnecessary delay" citing Rule Five A of the Federal Rules of Criminal Procedure (18 USCA). This applies to all persons accused of Federal Crime—and therefore covers Crimes under The Uniform Code of Military Procedure.

The Court said at Page 1359:

> "The arrested person may be booked, by the police. But he is not to be taken to Police Headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt."

In the Mallory case the Court quotes from the leading case, the case of McNabb v. United States, 318 U.S. 332; 63 S. Ct. 608, 614; 87 L. Ed. 819, as follows:

> "The purpose of this impressively pervasive requirement of criminal procedure is plain. * * * The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society.
>
> "For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime."

No doubt the crimes charged in this case were henious. However, the Supreme Court in the case of Chessman v. Teets, 77 S. Ct. 1127 at 1132, stated:

> "On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guiit has been established in accordance with the procedure demanded by the Constitution."

The interest of the United States in a criminal case is not that it should win a case but that Justice shall be done. Berger v. United States, 295 U.S. 78, 88.

Military Courts are bound by the decisions of the United States as to admissability of confessions.

U. S. v. John A. Bennett,
7 U.S.C.M.A. 97,
21 CMR 223.
U. S. v. Taylor,
5 U.S.C.M.A. 178,
17 CMR 178.

The Military Court of Appeals passed on the direct question in this case that the pretrial statements made by the accused were not coerced—they held against him—USCMA—U.S. v. Abraham Thomas, No. 5792, decided June 24, 1955. So this constitutional right of appellant can clearly be reached in this proceeding.

Certainly, the armed forces operating under the Uniform Code of Military Procedure cannot set up a different set of rules, or interpret the Constitution in a manner not approved by the Supreme Court. Can there be any question as to what the Supreme Court would hold where, as here, the accused was confined and continuously questioned for four full days and two nights without being charged or arraigned—and the statements so elicited used against him at his trial. Certainly the law and the Supreme Court's rulings on it are now plain and clear in view of recent decisions.

POINTS II AND III.

On the fourth day of the continuous questioning of appellant he was tricked into making a long statement which was recorded on a tape recorder. The machine had secretly been set up in a room at headquarters, a microphone was placed in a second room and concealed behind a garrison cap—appellant was interrogated in the room where the microphone was concealed. He was not advised that the conversation, or statement, was being recorded. It happened that this first recording was not usable because of the cap placed over the microphone. The investigators claim they then placed the microphone on a table in front of appellant and he agreed to repeat his statement again speaking into the microphone. Appellant denies the microphone was placed before him. In any event he was not told the statement was being recorded, nor was he given any explanation. In fact the investigators state they doubt if appellant even knew what a microphone, or a tape recorder was.

At the Court Martial Trial of appellant a typewritten copy of the tape recording, prepared by the investigators was read to the Court Martial. Also the actual tape recording was played to the Court Martial. In addition when the prosecution made its closing argument the following statements were made to the Court:

> "And if you remember the fact that the Transcript of that recording was introduced in evidence first, and if you compared that Transcript with the recording you had very little difficulty in understanding the recording. *YOU HEARD IN THOMAS' OWN WORDS, AS HE RELATED, HOW HE KILLED*

THESE PEOPLE; THESE FOUR PEOPLE." (Court Martial Trial R. 460)

Again at page 480 Trial Court Martial:

"THEY LET HIM TELL IT IN HIS OWN WORDS—AS YOU LISTENED TO THE TAPE THERE—AND THOSE WERE HIS OWN WORDS, GENTLEMEN."

The appellant under his constitutional right under the Fifth Amendment elected not to take the stand. (Court Martial Trial R 66 and 411)

Do the above facts amount to requiring appellant to testify against himself?

The appellee in the Court below and, no doubt, in this Court relied on the rule laid down in a case decided by its Court, to-wit: Beverly, Suttles & Riggens v. Davis, 215 F.(2d) 763, to the effect that a claimed denial of a constitutional right must be present to the Military Courts and if not, it cannot be first brought up on a Writ of Habeas Corpus—However, the Supreme Court in the case of Chessman v. Teets, 73 S. Ct. 1127-1132, stated:

> "Evidently it also needs to be repeated that the over-riding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because Courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States."

The Supreme Court has in several recent cases clearly indicated the sanctity of the right of any person to not incriminate himself. Watkins v. U. S., 77 S. Ct. 1173.

The right to not incriminate oneself has recently been passed on by our Supreme Court; Ullmann v. United States, 76 S. Ct. 497; 350 U.S. 422. The Court held that the constitutional protection against self-incrimination must not be interpreted in a hostile or niggardly spirit. That the privilege should be interpreted in view of policy that it is better for an occasional crime to go unpunished than that prosecution should be free to build up a criminal case, in whole or in part, with assistance of enforced disclosures; that the privilege should serve as a protection to the innocent as well as to the guilty, and should be given a liberal construction; that the Court approaches claims of constitutional guarantee against self-incrimination in a spirit of strict, not lax, observance of the constitutional protection of the individual.

The cases of Burns v. Wilson, 346 U.S. 137, and Toth v. Quarles, 350 U. S. 11, hold that under the uniform Code of Military Procedure the accused must be afforded a fundamentally fair trial; that the power of Courts Martial should be scrupulously guarded and its power limited rather than enlarged.

CONCLUSION.

We must bear in mind that appellant, born in the South, had only a 3rd grade education; that he had no previous record or familiarity with Courts. That the so-called confessions were coerced after four full days of questioning; that he was never charged during this time; nor advised of his right to counsel; that a tape recording of his own voice was played to the Court and that the prosecutor in the final argument twice commented on the fact that the Court had heard appellant "in his own words" admit his guilt—this in face of appellant's decision not to take the stand.

The interest of the United States in a criminal case is not that it should win a case, but that Justice shall be done. Berger vs. United States, 295 U.S. 78, 88.

Appellant respectfully prays the Honorable Court to grant certiorari herein.

Respectfully submitted,

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